

Your Insureds' Contractual Requirements - Part 2

Here's what got me thinking about contract requirements and whether the insurance we provide fulfills them, and more importantly, whether we have a duty to provide insurance that fulfills such requirements.

The insured is an architect firm, and the agent sent me the contract for a potential job to make sure our existing coverage met the limits requirements and there were no problems with the indemnification wording.

However, the very first thing I noticed about the contract when I started to look it over is that it requires the following: "The policy shall include without limitation contractual liability coverage to the maximum extent possible for the indemnification obligations..."

I feel like this is one of those pictures where you pick out how many things are wrong:

How many policies have you ever seen that included coverage "without limitation"? How many policies cover contractual liability coverage (and contractual damages)? How can you have coverage "without limitation" and "to the maximum extent possible" at the same time? "Possible" meaning - as circumscribed by policy language? Or "possible" meaning -- that which is provided by the broadest coverage available in the world?

The indemnification wording combined with the requirement quoted above work to create sort of an Additional Insured situation where the client is looking for an agreement that the carrier will fund the insured's defense and indemnification of them in the case of a loss arising from the insured's negligence. Yet they did not ask to be named as an Additional Insured (which I don't encourage anyway).

Interestingly, the drafter of this contract knows enough about claims-made coverage to require that if the policy is claims-made the retro date must pre-date work done under the contract. But the contract does not require that coverage, or an Extended Reporting Period, be kept in place for a period of time after the work is done.

Last, but not least, and a tip of the hat to one of my loyal readers who shared a similar situation with me after last week's Knugget, the contract requires a 2mm "per Occurrence" (sic) limit. Notwithstanding the mis-spelling, have you ever seen a per-occurrence limit on a professional liability policy? If it happens at all, I suspect it's extremely rare. Our policy limits are put up on a "per claim" basis, with the exception of some specialty lines which focus on line-specific language. I don't think I've ever seen the word "occurrence" on the dec. So if one were to be exceedingly particular, virtually no policy would ever be able to meet that requirement. Could there be a situation

where this difference in terminology could result in an unexpected difference between what the client wanted and what the policy provided?

The important thing to deal with here is that the professional liability policy is not a contractual coverage. It's a negligence policy with exclusions, conditions and other limitations. If a client is damaged by the insured's errors or omissions, the policy will respond accordingly, and that's what the client should be looking for when wanting proof of coverage. If the insured does anything that triggers a contractual obligation, and the client seeks compensation under the contract -- no dice. So we generally cannot provide coverage that would meet a contractual liability requirement.

And I wonder if any client has ever withheld payment due to lack of an insurance policy that meets the contractual requirements. Hmmmm.

You could drive yourself (or your insured) crazy analyzing contract requirements to the nth degree, and advising when disconnects like the above occur so the insured can go back to the client and attempt to resolve the problems with the contract wording. And it's always problematic for an insured to be relying upon the advice of his agent to bring up contract wording problems while the client is relying upon the advice of his attorney -- who may know a lot about transfer of risk and contracts, but not much at all about insurance. I think it's worth it in the long run to fight the good fight. Eventually, the clients will get enough of the same feedback and mend their ways.